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Issue Date: 28 January 2003

CASE NO: 2002-STA-00012

In the Matter of:

RUSSELL OLSON,

Complainant,

v.

HI-VALLEY CONSTRUCTION COMPANY,

Respondent,

Appearances:

James E. Davis, Esq.
Yakima, WA
for Complainant

Ryan M. Edgley, PLLC
Yakima, WA
for Respondent

Before:
Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the provisions of Section 405 of the Surface and Transportation Assistance Act, 49 U.S.C.§ 31105 (hereinafter referred to as the "STAA").[1]

[1]The STAA was enacted for the purpose of promoting safety on the nation's highways, and, among other things, prohibits any person from discharging or otherwise discriminating against an employee in retaliation for having engaged in certain safety-related activities. The Department of Labor regulations implementing the STAA are set forth at 20 C.F.R. § 1978.

On May 24, 2001, Complainant Russell Olson's ("Complainant's") complaint under the "whistle blower" protection provisions of the STAA, against Respondent, Hi-Valley Construction Company, ("Hi-Valley"or "Respondent")[2] was received by the Secretary of Labor. Among other things, Complainant alleged that Hi-Valley had terminated him for refusing to drive a purported overweight truck owned by Hi-Valley. The Occupational Safety and Health Administration ("OSHA") conducted an investigation; thereafter, the Secretary of Labor, through her agent, the Regional Administrator for OSHA, issued findings on October 11, 2001, finding that Complainant's claim lacked merit. On November 10, 2001, Complainant requested a hearing before an administrative law judge.

A formal hearing was held in Yakima, Washington, on October 16 and 17, 2002. Both parties were present and represented by counsel. The following exhibits were admitted into evidence: Complainant's Exhibits ("CX") 1, 3, 5, 6, 8, 12, 17 and 18; Respondent's exhibits ("RX") 101 - 104; and Administrative Law Judge Exhibits ("ALJX") 201 - 208.[3] Complainant Exhibits 2, 4, 7, 9-11, and 13-16 were not admitted into evidence having either been withdrawn or denied for reasons referenced in the record. TR[4] pp. 8-33,192-95,228-32, 308-319. The parties, Complainant and Larry Roark, on behalf of Hi-Valley, testified as did witnesses Ronald D. Moody, a Yakima County Public Works/Dust Abatement program inspector, and Matt Petrochevetz, a Yakima County Road Maintenance Manager. Documentary evidence was offered and oral arguments were made. The parties submitted post-hearing briefs on November 18, 2002, the record closed, and this Court took the matter under submission.

After reviewing all of the evidence, I find that Complainant did not take part in a protected activity on April 23, 2001 and that, even if he did, Complainant failed to prove that Respondent terminated his job. Finally, even if there was sufficient evidence to show that both a protected activity and adverse action occurred, there was insufficient evidence to prove that any adverse action by Respondent was in retaliation of a protected activity.

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[2]Throughout this recommended decision, "Employer," "Hi-Valley," and "Respondent" will be used interchangeably to refer to Hi-Valley Construction Co. Further, the actions of Larry Roark, principal owner of Hi-Valley, are considered to be those of the Employer.

[3]ALJ Exhibits 207 and 208, respectively, are comprised of Complainant's Closing Brief (Ex. 207) and Respondent's Closing Brief (208) without documentary attachments.

[4]The abbreviation "TR" refers to the hearing transcript.

STIPULATIONS

The parties stipulate, and I accept that:

1. a) Respondent engaged in interstate trucking operations and, in 2001, maintained its place of business in Selah, Washington. In the regular course of this business and at all times relevant herein, Respondent's employees operated commercial motor vehicles affecting interstate commerce principally to transport the road maintenance mixture of lignin[5];

b) Respondent is now, and at all times relevant herein, was a person as defined by 49 U.S.C. § 31101(3)(a).

c) On or about April 9, 2001, Respondent hired Complainant as a driver of a tractor-trailer rig with gross vehicle weight in excess of 10,000 pounds;

d) At all times relevant herein, Complainant was an employee in that he was a driver of a commercial motor vehicle having a gross vehicle rating of 10,000 or more pounds used on the highways in interstate commerce to transport road maintenance materials.

e) Complainant was employed by a commercial carrier, and, in the course of his employment, he indirectly affected commercial motor vehicle safety pursuant to 49 U.S.C. § 31105.

f) The parties further stipulated that Respondent was Complainant's sole employer as Respondent provided the equipment that Complainant selected to drive, Respondent paid his wages, and directed Complainant's work hours, and instructed him as to how to use the equipment it provided.[6]

TR pp. 5-7, and 318, ALJX 207, p.7; ALJX 208, pp.3,14-15.

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[5]Both sides agreed that lignin is comprised of wood pulp and water, a mixture of approximately 25% water and 75% wood pulp. TR 59-60. When mixed further with an additional 25% water combination, as done in 2001 and prior years in Yakima County's dust abatement program, the final delivered mixture weighs approximately 9.6 pounds per gallon. TR 72 This is the same weight estimate for lignin testified by Matt Petrochevetz, the Yakima County Road Maintenance Manager. TR 106-07,113-14. The parties also agreed that lignin weighs approximately 9.6 pounds per gallon. ALJX 201, p.1, ALJX 202, p.3.

[6]Because there is no dispute as to Respondent being Complainant's sole employer, the joint employer doctrine is inapplicable here.

ISSUES

The unresolved issues in this proceeding are:

1) Whether the Complainant engaged in protected activity;

2) Whether the Respondent took an adverse employment action against the Complainant as a result of that protected activity; and, if so,

3) Whether Respondent's adverse action was in retaliation of Complainant's protected activity?

FACTUAL BACKGROUND

The 2001 Yakima County Dust Abatement Program

Beginning on April 9, 2001, Respondent leased its entire fleet of four vehicles, together with four drivers, as a subcontractor in performance of the Yakima County dust abatement contract. TR 47, 248-49, ALJX 208, pp.4 and 8. For more than 10 seasons through 2001, Yakima County had sprayed a product called lignin[7] on its roads for maintenance purposes. TR 111-12, ALJX 208, p.4, ALJX 201,p.1.

Respondent, with its same trucks, including the subject truck/trailer combination selected by Complainant ("Truck #8")[8], and Complainant, both driving Respondent's trucks and driving his own, had previously participated in the dust abatement program. Respondent and Truck #8 participated for at least six or seven years and Complainant for at least two years prior to 2001, both years hauling Truck #8's trailer owned by Respondent and the subject of this case. TR 38, 249,261,306. In addition, Complainant contracted to deliver lignin for the County with his own tractor but with Respondent's trailer in both 1992 and one other time thereafter prior to 2001. TR 39,122-25. Complainant testified that he has been weighing trucks and trailers for years. TR 172.

The dust abatement program consisted of loading the lignin into tractor-trailer combinations at a railroad siding located in mid-Yakima County, transporting the product to gravel road sites throughout the County, and loading it into a distributor truck to be spread on the road surface. TR 58-9, ALJX 208, p.4. The County did not measure the volume of lignin in the delivery trucks including Truck #8 but did use a float gauge reading from the distributor truck as to the number of gallons loaded on the distributor or spray trucks. TR 89-90.

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[7]See footnote 5 above.

[8]Truck #8 was comprised of a front cab tractor with a single steering axle and a tandem set of axles and a trailer that contained a second set of tandem axles at the rear. The trailer held all of the loaded lignin.

The Yakima County contract required the tractor-trailer combinations to deliver a minimum of 5,000 gallons of the lignin mixture at a time. CX 1, p.4, TR 92-3, 108, 284, ALJX 208, p.4, ALJX 201, p.1. This same minimum hauling requirement was a part of Yakima County's contracts with trucking companies for at least 10-15 years prior to 2001. TR 111-12, 228, ALJX 208,p.4. The County maintained daily reports with reference to any gallonage that was considerably below the County's required minimum level of hauling. TR, pp. 89-92.

County representatives Mr. Petrochevetz and Mr. Moody both testified that they have not enforced, nor do they currently enforce, the 5,000 gallons load requirement strictly, allowing, instead, a minimum of 4800 gallons as an acceptable load in compliance with the dust abatement contracts. TR 92-3, 99, 108-9, ALJX 208,p.5. The purpose of this requirement is to insure the distributor truck has a constant supply of lignin and will not run out while a second truck makes the round-trip to deliver another load. TR, p.108, ALJX 208,p.4. In addition, the County paid the trucking contractor by the hour for the time it took to complete the dust abatement project and lesser loads cost the County more money in the form of an extended period of time to complete the project and more payable hours. TR 112-13.

Complainant's Limited Role In The 2001 Dust Abatement Program

Complainant was employed as a professional truck driver by Hi-Valley from April 9, 2001, to April 23, 2001 when he refused to haul more than 4,000 gallons of lignin in Truck #8. TR 41, 79, 207-08, 220. Complainant testified that he has over 25 years of truck driving experience and that his duties for Hi-Valley consisted primarily of driving a tractor-trailer rig in Yakima County, Washington. TR 38. Generally, Complainant would load the tractor-trailer rig with the lignin himself and deliver it to a designated road location in the County of Yakima for drop-off with a distributor truck that sprayed the substance to maintain the roadways.[9] TR. p. 47**,** ALJX 208,p.4.

In April 2001, Complainant voluntarily selected Truck #8, a 1986 Freightliner tractor with a 1958 Fruehauf tank trailer, a setup Complainant was familiar with and had driven at least two years previously for Hi-Valley. TR 47-8, 126, ALJX 208,p.4. Complainant also said that he previously used the same trailer with his own tractor to haul lignin at least an additional two times since 1992 under the same Yakima County requirements imposed on Hi-Valley. TR 39, 122-25. Complainant could have chosen a different, larger tractor/trailer combination but preferred Truck

[9]Respondent argued that the delivery of lignin might be exempt from the maximum gross weight limitations provisions of Washington State maximum gross weight limitations for commercial vehicles that is provided in Washington State vehicle code § 46.44.150 which states that commercial vehicles can exceed the maximum gross weight limitations altogether if the purpose of the transportation is road construction or improvements projects. Here, the purpose of Respondent's sub-contract with the County of Yakima was for road maintenance as stated in credible fashion by Yakima County Road Maintenance Engineer Matt Petrochevetz. TR., pp. 105-06. Therefore, the exemption of Washington Code § 46.44.150 is inapplicable in this case as road maintenance is distinguishable from road construction or improvement.

#8. TR 216, CX 18, p.16. The tractor/trailer combination left for driver Steve Hurd in 2001 was able to legally carry 80,000 pounds according to Complainant. CX 18, p.16. No evidence was presented that before 2001, Complainant had complained about any lignin load causing violation of any maximum weight provision contained in Washington State or any federal statute, rule, or regulation.

There was a dispute as to the length from the steering axle to the last rear axle of the subject Truck #8. Complainant testified that the length was 46 feet. TR 49, 137-38, 145. Earlier, Complainant had asserted his belief that the length was 42-44 feet. CX 18, p.16. Respondent testified that this length was 51 feet, 10 inches. TR 226, 267. In addition, there was no dispute as to the distance between the two furthest tandem axles as both parties agreed that the distance was 34 feet. TR 50-51, 239. Mr. Roark testified that the two steering tires of Truck #8 in April 2001 were 11/24-5's. TR, p. 294.

As referenced above, the trailer chosen by Complainant, as part of Truck #8, had previously been used in the transportation of lignin by both Complainant and other drivers at Hi-Valley for at least 10 years through 2001. TR 261, ALJX 208,p.4. The trailer was weighed approximately five times in years prior to 2001 when Complainant used it to haul lignin, but was determined to be overweight only once. TR 250, 303, ALJX 208,p.4. Mr. Roark provided credible testimony that in the 10 years prior to 2001 when Truck #8 was used to haul lignin, the trailer was weighed at least seven times, but was determined to be overweight only once. TR 250, 261-2, ALJX 208,pp.4-5.

Early on before April 9, 2001, Complainant and Mr. Roark discussed ways to ease weight issues when the new dust abatement season began in 2001 because they knew that Truck #8 was close to the legal weight limit when loaded with 5000 or more gallons of lignin.[10] TR 263; ALJX 208, p.5. Years earlier, Hi-Valley removed the tin skin from the trailer and replaced it with aluminum, stripped all the insulation, removed the tire carrier, and removed asphalt that had accumulated from prior use to make the truck combination lighter. TR 262, ALJX 208,p.5. Truck #8 had a capacity to load 7,000 - 7,500 gallons of product. TR 98, 157, 286, ALJX 208,p.6. Using a separate pup trailer or adding another axle were two alternatives discussed by Complainant and Mr. Roark at the start of the 2001 dust abatement project, but neither were practical solutions for increasing the load. TR 199-200, 263. Mr. Roark credibly testified that Complainant did not mention weight problems with Truck #8 and only mentioned adding axles to Truck #8 before the dust abatement project started in 2001 and later in the day on April 23, 2001 after Complainant refused to haul more than 4,000 gallons of lignin. TR 228, 241, 243.

The tractor used to pull Truck #8 had four fuel tanks capable of carrying 600 gallons of diesel fuel. TR 284, ALJX 208,p.5. Complainant testified that only two of four diesel tanks worked and that there were probably 300 gallons of fuel in Truck #8's tanks. TR 71. At

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[10]The drivers loaded the lignin at their own discretion at any quantity up to the trailer's capacity of 7,000 - 7,500 gallons.

Complainant's deposition, however, he testified that the fuel tanks were full of fuel as of April 19, 2001 when he weighed Truck #8. TR 174, 301. Mr Roark also testified that all four tanks were connected to one another in April 2001, with just one fuel gauge, and fuel was used from all four tanks simultaneously during the operation of the truck. TR 284, 299. Mr Roark testified that if fuel is put into one of the four tanks, it distributes itself into all four tanks equally. TR 299, ALJX 208, p.5.

Complainant testified that he became concerned about the gross weight of Truck #8 a couple of days into the job in April 2001.[11] TR 61. He further testified that he first weighed Truck #8 for purposes of figuring out gallon calibration for a 5000 gallon lignin load. TR 63. Complainant did not obtain a written weight ticket or slip until April 19, 2001. TR 63.

Complainant also testified that there were minor problems associated with Truck #8 when he selected it in early April 2001. TR 43. Complainant identified a cracked windshield on Truck #8 but was unable to remember where the crack was located. TR 43, 125-27. He later testified that he could not remember whether the photograph of Truck #8's windshield without any crack, identified as RX 104, pp.4-5, fairly and accurately depicted Truck #8's windshield in April 2001. TR 125-27. Mr. Roark testified that the same photographs, RX 104, pp. 1-5, accurately depicted Truck #8 as it existed in April 2001, except for the added 3rd axle on the trailer. TR 281. Mr. Roark testified that the windshield of Truck #8 was not cracked in April 2001 and had not been replaced in or after April 2001. TR 217. Complainant also testified about a perceived problem with Truck #8's air dryer/air can/diaphragm portion of its brakes. TR p. 125, 130. He testified that Mr. Roark immediately fixed this problem once mentioned by Complainant. TR 125, 130-31. Complainant pointed out to Respondent early on in the project that a small portion of foam padding cover was missing from Truck #8's steering wheel. TR 44, 218. Complainant testified that he believed that Hi-Valley should have some type of pre-employment drug testing program for its drivers. TR 45. Mr. Roark convincingly testified that he did not need such a program since Yakima County already provided this same program for drivers under the dust abatement program. TR 218, CX 1,p.2; RX 101. Mr. Roark also testified that Complainant did not raise concerns at any time about missing lug nuts, a cracked windshield, or a problem with Truck #8's u-joint on the steering wheel. TR p.217. Complainant also complained about a door on Truck #8 not being marked with a U.S. Department of Transportation number. TR 127-28. No evidence

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[11]Respondent argues that the State of Washington's' maximum gross weight provision at RCW 46.44.041 is not a safety law and, therefore, Complainant was not engaged in protected activity when he allegedly refused to drive Truck #8 because to do so would violate the maximum gross weight law. ALJX 208, pp. 9-14. Even if one purpose of RCW 46.44.041 is revenue generating, that does not mean that the weight and permit system does not also pertain to safety. Clearly it does, since adequate road maintenance is a necessity for safe vehicle transportation. See 62 Fed. Reg. 1293 (1997)(In issuing a final rule under the Intermodal Safe Container Transportation Amendment Act of 1996, the Federal Highway Administration stated that, "[t]he purpose of highway weight laws is to minimize highway and bridge wear and protect the motoring public.").

was presented that the absence of such number was in violation of any law, statute, regulation, or rule.

Complainant's Pattern Of Arriving Late For Work

Mr. Roark instructed his three drivers, including Complainant, to be at his property by 6:00 a.m. to do a pre-trip inspection and have sufficient time to get to the County yard by the required time of 6:30 a.m. TR 151-53, ALJX 208,p.5. The four drivers, including Mr. Roark, would work a four ten-hour work week Monday through Thursday. TR 240-41, ALJX 208, p.6. They were paid through five p.m. although, in actuality, they usually stopped work at 4 o'clock each day. TR 160. The drive from Mr. Roark's property to the County yard took anywhere from 15 to 45 minutes. TR 197, ALJX 208, p.5. Mr. Roark also instructed his drivers regarding how to perform the required tasks and how much they would be paid. ALJX 208,p.5. Hi-Valley supplied the trucks and trailers and paid the drivers their wages. TR pp. 42, 221; ALJX 208,p.5.

In addition to Complainant in 2001, Hi-Valley had three other trucks delivering lignin for the County including one driven by Mr. Roark in a different part of the Yakima Valley than Complainant. TR pp. 76, 243-44, 274, 278; ALJX 208, p.5. Also, one truck ended the day loaded with lignin with the other truck empty. TR 155. As a result, Mr. Roark rarely saw Complainant except a couple of brief encounters at Hi-Valley's property or at the County yard in the morning. TR 244.

From the beginning of the 2001 dust abatement program on April 9 until Wednesday, April 18, 2001, Complainant was usually the last driver to show up at Mr. Roark's property to do each day's pre-trip inspection and leave to travel to the County yard. TR 160, 184, 195-96. Once, Complainant called Mr. Roark asking for a ride from his house to Mr. Roark's property where Truck #8 was located. TR 150. A second time on April 18, 2001, Complainant was late for meeting the 6:30 a.m. County yard deadline and was docked an hour's wages. TR 148, ALJX 208,p.5. This resulted in Mr. Roark also being docked an hour's payment for the truck assigned to Complainant. TR 274, ALJX 208,pp.5-6. Mr. Roark addressed this problem with Complainant the next morning on April 19, 2001 at the County yard. TR 152-55, ALJX 208,p.6. Complainant testified that he was docked an hour of pay not for being late but because Mr. Roark lied to Mr. Moody by telling him that Complainant was already at a dump site when, in fact, Complainant was on his way. TR 148-49. Mr. Moody did not confirm Complainant's testimony when he was called as a witness.

As the dust abatement project progressed, Complainant would frequently arrive later than the other drivers of Hi-Valley at its equipment yard or the County Yard. TR 151-54, 244, 246. Mr. Roark told Complainant that he wanted him at his property by 6:00 a.m. so that Complainant could perform the pre-trip inspection in a timely manner. TR 151-54. This included warming Truck #8's engine. Complainant viewed this request as work done "off-the-clock" and for no additional compensation so he continued to show up between 6:00 and 6:30 a.m. TR 147. Although Mr. Roark denied ever telling Complainant that if he were late again after April 18 that

he would be fired, Complainant had heard rumors from other Hi-Valley drivers before April 19, 2001 that Mr. Roark wanted to get rid of him. TR 149-50. Complainant attributed these rumors to his requests that Hi-Valley comply with his weight-limit concerns rather than his pattern of being late for work. TR 149. Complainant testified that when he was late for work on April 18, Truck # 8 would not start and because of this, he thought that Mr. Roark had made up his mind to fire Complainant. TR 183.

Complainant's Actions On April 19, 2001

Complainant and Mr. Roark met the morning of April 19, 2001, and Mr. Roark reminded Complainant that he needed to be at Hi-Valley's yard by 6:00 a.m. for a pre-trip inspection of Truck #8. TR pp. 153, 270-71. Complainant responded by saying that he did not get paid until 6:30 a.m. and maybe he would write down 6:00 a.m. on his timecard. TR 271. Mr. Roark told Complainant that he could not be late any more. TR 271. Mr. Roark testified that without a proper pre-inspection and warm-up of Truck # 8's engine, Complainant's tardiness was causing extra wear and tear on his equipment. TR 271.

The first thing that Complainant did after discussing his being late with Mr. Roark at the April 19 morning meeting was to weigh Truck #8 purportedly empty. TR p. 69; ALJX 208,p.6. This was the first weight ticket that Complainant obtained for the 2001 season despite the no cost ease of weighing and the location of the fertilizer company's weight scale directly across the street from the yard where the lignin was loaded from railcars. TR 61, 146.

The truck/trailer combination's net or tare weight registered as 33,380 pounds when empty at 8:28 a.m. TR 69. ALJX 208, p.6,ALJX 201, p.1. Next, Complainant loaded lignin into the trailer on his own and re-weighed the truck/trailer. TR 68-9, ALJX 208, p.6. Truck #8 weighed 86,200 pounds at 9:12 a.m. CX 6,ALJX 208, p.6. Complainant testified that the gross weight of 86,200 pounds resulted from a 5000 gallon lignin load . TR 68-69. County worker Ron Moody recalled seeing this weight ticket and noting that Truck #8 was considerably overloaded. TR, p.102.

A second weighing was done on April 19 indicating a gross weight with lignin/water of 77,320 pounds at 2:18 p.m. but without an earlier tare (empty) weight as has been done for the morning load. CX 5. Instead, Complainant hand-wrote what he considered to be the empty trailer tare weight of 33,380 pounds. CX 5. No evidence was presented as to how much diesel was present in Truck #8's four fuel tanks on April 19, 2001 other than Complainant confirming his earlier deposition testimony that the diesel tanks "were probably full" on the morning of April 19, 2001. TR 174, 183, 301. The parties agreed that diesel fuel weighs about the same as water at 8.34 pounds per gallon with a full tank weighing 5,004 pounds (600 gal. x 8.34 lbs. per gal.). TR p. 106; ALJX 207, pp. 4-5. The parties agreed that Mr. Roark had exclusive authority to fill his trucks' fuel tanks and filled them on an "as needed" basis. TR 70-71, 299.

The lignin/water mixture specified by Yakima County weighs 9.6 pounds per gallon, according to the detailed testimony of Yakima County Road Maintenance Manager Matt Petrochevetz. TR pp. 106-07, 113-14; ALJX 201, p.6. Both parties agreed that 9.6 pounds per gallon was an appropriate weight to use for the lignin/water mixture. ALJX 201,p.1, ALJX 202, p.2. Mr. Petrochevitz' uncontested testimony was that water weighs 8.34 pounds per gallon. TR p. 106, ALJX 207, p. 4-5. Although Complainant testified that he was trying to determine the gross vehicle weight with 5,000 gallons of the lignin/water mixture in the trailer, he did not record the number of gallons of lignin loaded prior to weighing Truck #8 the first or second time on April 19, 2001. ALJX 208,p.6.

At 9.6 pounds per gallon, 5000 gallons of lignin weighs 48,000 pounds and the gross weight of Truck #8 with that amount of lignin combined with Complainant's tare weight with full diesel tanks of 33,380 pounds would be 81,380 pounds. ALJX 201,p.1. Complainant's April 19, 2001 weight ticket (CX 6) documented a gross vehicle weight of 86,200 pounds at 9:12 a.m. thereby indicating a load in excess of 5,000 gallons of lignin. CX 6.

Complainant testified that he had a conversation with Yakima County inspector, Ron Moody, on April 19, 2001 where Mr. Moody noted that Complainant's delivered lignin load was well below the desired 5000 gallon amount, about 4,200 or 4300 gallons. TR pp. 78-79. Complainant stated that he replied that he would have to cut his load weight back further to 4,000 gallons of lignin to get to a legal weight limit. TR 74-75, 79. Mr. Moody testified that he did not recall any specific conversation with Complainant about Complainant's concerns that Truck #8 might be overweight particularly after viewing the morning weight ticket (CX 6) showing considerable overload. TR 90,93, 102. Mr. Moody also testified that Yakima County daily reports from the 2001 dust abatement project would show his notations for loads that were delivered short of 5000 gallons. TR 92, 94. Complainant never told Mr. Roark that he was weighing Truck #8. TR 286.

Complainant's Actions On April 23, 2001

Because Complainant worked four ten-hour days, Monday through Thursday, Monday, April 23, 2001, was the next day Complainant worked after weighing Truck #8 on April 19. TR 240-41; ALJX 208,p.6. On April 23, 2001, Complainant twice loaded the lignin mixture to Truck #8 at levels below the stated 4,800 gallons minimum. ALJX 208,p.6. Complainant testified that he did not weigh Truck #8 at any time on April 23, 2001 but "eyeballed" 4,200 - 4,300 gallons of lignin/water delivered to the distributor spray truck. TR 77, 78, ALJX 208,p.6. Complainant also testified that on April 23, 2001, he was getting ready to bring a load back of 4,000 gallons of lignin, an amount Complainant believed was closer to the legal limit he perceived for Truck #8. Tr p. 79.

After twice delivering "short" loads of the lignin mixture on April 23, 2001, Mr. Moody told Complainant that if he could not deliver the minimum lignin load requirement, he would not be allowed to deliver lignin under the County's dust abatement contract and was turned away. TR

162-67, ALJX 208,p.7. As a result, Complainant voluntarily left his job on April 23, 2001, when he failed to comply with the County's minimum delivery requirements of at least 4,800 gallons of the lignin mixture per load.[12] Mr. Moody never told Complainant he could not continue hauling, instead, he told Complainant - "If you can't haul up to specifications [4800 lignin gallons], we can't use it." TR pp. 133-34. Mr. Moody testified that he did not recall Complainant mentioning the weight of Truck #8 when it was taken out of service by Moody but did recall having a conversation with Complainant about Complainant's concerns about the possibility that Truck #8 might be overweight at lignin quantities under 4,800 gallons. TR 90, 96.

Complainant testified, however, that he believed Truck #8 to be over the maximum gross limit at a number of different lignin volumes. He believed that Truck #8 was illegally overweight when it weighed 77,320 pounds loaded with 4,577 gallons of the lignin mixture and full fuel tanks. TR pp. 69-72, 74, 301; CX 5. Complainant also testified that he told Mr. Moody on April 23, 2001 that he would have to cut back below 4,200 gallons of lignin to comply with the gross maximum weight limit for Truck #8. TR 74-75. Complainant also stated that he thought 4,000 gallons of lignin loaded on Truck #8 was a little closer to Truck #8's legal limit for gross vehicle weight. TR 199. Complainant's closing brief contradicts his testimony by alleging that the total maximum gross weight allowed on Truck #8 is only 76,500 pounds.[13] TR 51-58, ALJX 207, p.4. Earlier, Complainant submitted his sworn statement that included his belief that Truck #8 could legally haul 77,000 pounds. ALJX 203, p. 6. Complainant also incorrectly believed that the total distance from the front of Truck #8 at axle 1 to the back of Truck #8 at axle 5 was anywhere from 42 feet to 46 feet rather than the correct measurement testified to by Mr. Roark of 51 feet, 10 inches as confirmed after hearing one evening by Mr. Roark, Complainant, and his counsel. TR 137, 145, CX 18, p.16.

Complainant proceeded to drive Truck #8 back to Mr. Roark's property after Truck #8 was taken out of service for failing to comply with minimum load requirements. TR 86, 248. On April 23, 2001, Complainant left the work site without having any discussions with his employer. TR 130-136, 247, ALJX 208, p.7. He was on his way to return Truck #8 to Hi-Valley's yard when he received a call from Mr. Roark. TR 130-36, ALJX 208, p.7. Mr. Roark had been contacted in the lower valley at mid-day by a County representative and had been told that Complainant had quit delivering lignin loads. TR 247, 273. He called Complainant and asked "what was going on?" TR 130-36, ALJX 208, p.7. Complainant replied that he "could not haul legal and they're [the County is] cutting me off." TR 135. Mr. Roark testified that he begged Complainant to keep driving Truck #8 and to switch hauling locations with another driver. TR, p. 276. As a result of this conversation, Mr. Roark thought that Complainant had agreed to switch locations for hauling lignin with Frank Valencia, a fellow Hi-Valley driver, and Mr. Roark waited

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[12] Neither Complainant nor Hi-Valley had discretion to continue providing equipment or labor without complying with Yakima County's minimum load requirements. CX 1, p. 4.

[13]Subtracting the alleged tare weight of 33,380 pounds from this 76,500 pounds amount results in 43,120 pounds of lignin or 4,491.667 gallons (43,120 lbs./ 9.6 lbs./gal.).

for Complainant in the lower valley. TR 274. After Complainant failed to show up in the lower valley, Mr. Roark called Complainant a second time on April 23 when Complainant was in his own truck driving to pay a utility bill and asked Complainant why he had not driven to the lower valley with Truck #8. TR 134-35, 275, ALJX 208, p.7. Complainant responded by saying that he refused to drive if he could not haul a legal load. TR 135, 275, ALJX 208, p.7. In response, Mr. Roark told Complainant that if he refused to drive, he would find someone else who would drive in place of Complainant. TR 248, 260, 275.

Mr. Roark testified that on April 23, 2001, there was no other equipment available for use on the dust abatement project as all four of his trucks were used to haul lignin, and there was no other work to which Complainant could be assigned. TR 248-49, ALJX 208, p.8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Based on my review of the testimony and exhibits, summarized above, I make the following factual and credibility findings:

1) It is undisputed that the final delivered mixture of lignin weighs approximately 9.6 pounds per gallon. 5,000 gallons, therefore, weigh 48,000 pounds.
2) Also, the tractor of Truck #8 has a set of tandem (double) drive axles behind the steering axle, and the trailer has a set of tandem axles at the rear of the trailer frame. TR 48, ALJX 208, p.4. Thus, there were a total of five (5) axles on Truck #8. TR 48, ALJX 208, p.4.
3) I find that the distance between the steering axle and the last (rear) axle on the trailer of Truck #8 is 51' 10". TR 226, ALJX 208, p.4. The distance between the two furthest tandem axles was 34'. TR p. 239; ALJX 207, p. 3; ALJX 208, p. 13. I further find that Respondent's testimony that Truck #8's two steering tires were 11/24-5's in April 2001 means that they were each 11 inches wide. TR 294.
4) As a result of these measurements and configurations, and applying the wheelbase and axle factors referenced in Revised Code of Washington § 46.44.041, I further find that *the legal maximum gross weight* applicable to Truck #8 in April 2001 was ***77,700*** pounds calculated by adding the maximum weight for the 34 feet distance between the two sets of tandem axles or ***64,500 pounds*** plus ***13,200*** pounds for the two eleven inch wide steering tires which, by Washington statute is calculated by multiplying the 11 inch steering tires times 600 pounds per tire times the two tires (11x600x2). Together the 64,500 pounds plus the 13,200 pounds equals ***77,700 pounds,*** Truck #8's legal maximum gross weight in 2001.

5) I take judicial notice and further find that the weight of a gallon of diesel fuel is comparable to the weight of a gallon of water or 8.34 pounds per gallon. Truck #8's fuel tanks could hold up to 600 gallons of fuel weighing approximately 5,004 pounds (8.34 x 600). Depending on the actual amount of fuel in Truck #8's fuel tanks, a variance from fuel of up to 5,004 pounds existed in Truck #8's total maximum gross weight.

6) Based on Complainant's representation that Truck #8's fuel tanks were probably full when he obtained Truck #8's tare weight on April 19, 2001, I further find that Truck #8's tare weight of 33,380 pounds on April 19, 2001 included 5004 pounds from full fuel tanks. If, for example, the 4 fuel tanks were only half full, I find that Truck #8's tare weight would be reduced by half of 5,004 pounds or 2,502 pounds to 30,878 pounds. With its fuel tanks being half full, Truck #8 could haul lignin weighing the difference between its gross maximum weight of 77,700 pounds and the tare weight referenced immediately above of 30,878 pounds or 46,822 pounds which is the same as 4,877.29 gallons (46,822lbs. / 9.6lbs./gal.).

7) I further find that any quantity of lignin of 4,800 gallons or more would have been acceptable to Yakima County inspectors like Ron Moody. Even with fuel tanks being one-third full, Truck #8 could legally haul a little less than 5,000 gallons of lignin.[14]

8) Mr. Roark testified credibly that when Complainant failed to show up on time on April 18, Truck #8 was shut off from its early morning warm-up which would explain why Complainant had trouble re-starting it when he arrived an hour late. TR 244-45.

9) Complainant's April 19, 2001 weight ticket (CX 6) documented a gross vehicle weight of 86,200 pounds at 9:12 a.m., almost 5000 pounds more than one would expect Truck #8 to weigh with 5,000 gallons of lignin.[15] This demonstrates that Complainant had loaded an excessive amount of

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[14]If the fuel tanks were one-third full or contained 200 gallons of diesel fuel (600x1/3), the fuel would weigh approximately 1,668 pounds (200 x 8.34) rather than 5,004 pounds when the fuel tanks were full (600 x 8.34). The tare weight of Truck #8 with there being one-third full fuel tanks is 30,044 pounds (33,380 pounds with full fuel tanks less 3,336 pounds (2/3 x 600 gal. x 8.34 lbs/gal.)). The legal gross maximum weight for Truck #8 of 77,700 pounds less this tare weight of 30,044 equals 47,656 pounds or *4,964.2 gallons of lignin* (47,656 pounds divided by 9.6 pounds per gallon). Consequently, 4,964.2 gallons of lignin could be legally hauled in Truck #8 as of April 2001.

[15]Truck #8's tare weight with full fuel tanks of 33,380 pounds plus 48,000 pounds for 5,000 gallons of lignin (5,000 x 9.6 pounds per gallon) equals *81,389 pounds* (33,380 + 48,000). 86,200 pounds (from April 19 weight slip, CX 6) less 81,389 pounds (weight of 5000 gallons of lignin with full fuel tanks) equals *4,811* pounds or 501.15 gallons of extra lignin (4,811 divided by 9.6 pounds per gallon).

> lignin on Truck #8 (5,501.15 gallons) which had capacity to hold up to 7000 or 7500 gallons of product. TR 98, 157, 286.

Witness Credibility

Evidence was submitted demonstrating Complainant's poor credibility. Complainant initially argued that he had not weighed Truck #8 before April 19, 2001. CX 18, p. 8. Later, Complainant changed his testimony to read that he had not documented the weight of Truck #8 before April 19, 2001 but that he had weighed the truck. CX, p.8. Complainant argued that he complained to Mr. Roark about a cracked windshield on Truck #8 before the lignin hauling began in early April 2001. At hearing, Complainant could not remember where the crack was located and presented no evidence, other than his contradicted testimony, concerning a cracked windshield. Complainant testified at his deposition that the 600 gallon fuel tanks of Truck #8 were probably full on April 19, 2001 when he recorded Truck #8's empty or tare weight. At hearing , Complainant confirmed his deposition testimony but also testified that there were only 300 gallon of fuel in Truck #8 when he determined its tare weight on April 19, 2001. Complainant argued that the total length of Truck #8 from steering axle to rear trailer axle was 42-46 feet limiting Truck #8's maximum gross weight to 70,000 - 72,500 pounds. In fact, Truck #8's total length is 51 feet, 10 inches as measured by the parties and their counsel. TR, p. 267. Complainant's position with respect to Truck #8's maximum gross weight limits vacillated throughout the case and extended to a low of 4,000 gallons of lignin to a high of 4,879.79. Complainant was not believable with his testimony that the condition of Truck #8 was defective from April 19 - April 23, 2001 and presented no evidence in support of his unsubstantiated allegations.

Conclusions of Law

The employee protection terms of the Surface Transportation Assistance Act provide that:

> No person shall discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because the employee refuses to operate a vehicle when such operation constitutes a violation of any Federal rule, regulation, standard, or order applicable to commercial motor vehicle safety or health or because the employee has a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. §§ 31105(a)(1)(B) and 31105(a)(2).

STAA burdens of proof and production are derived from Title VII cases, in particular, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987); *Kenneway v. Matlock, Inc.*, 88-STA-20 (Sec'y June 15, 1989). To establish a *prima facie* case, a complainant must show that 1) he engaged in protected activity under the STAA; 2) he was subject to an adverse employment action; and 3) there was a causal link between his protected activity and the adverse action of his employer. *Moon*, 836 F.2d at 229; *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984).

Once the complainant establishes a *prima facie* case, the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the adverse action was taken for a "legitimate non-discriminatory reason." *Burdine*, 450 U.S. at 254. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id*. However, the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Id*. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255. In spite of this shifting burden, the complainant at all times retains the ultimate burden of persuading the trier of fact that he was discriminated or retaliated against. *Id*. at 253.

Whether The Complainant Engaged In Protected Activity

Complainant has alleged that for this case, the "protected activity occurred between April 19, 2001 and April 23, 2001, when Complainant learned that the commercial motor vehicle issued to him by his employer [Truck #8] was not legally capable of carrying loads [of lignin] required by his employer's contractor." ALJX 201, p. 1. Similarly, Complainant argues that "his employment was terminated when he refused to operate a commercial motor vehicle [Truck #8] upon the interstate highways of the State of Washington in violation of RCW [Revised Code of Washington] §46.44.041 [the maximum gross weight limits for operation of five-axle vehicles upon Washington public highways]." ALJ Ex. 207, p.2.

The alleged protected activity, therefore, involves the Complainant's claim that on April 23, 2001, he was required to drive Truck #8 with a minimum load of lignin comprised of 4800 gallons and he refused to do so because such load actually violated the State of Washington's maximum gross weight limit provisions for operation of five-axle Truck #8. In fact, Complainant testified that he believed that Truck #8 could not legally haul 4,200 gallons of lignin and that the legal amount was closer to 4,000 gallons. TR pp. 74-75, 79.

> "In analyzing protected activity under § 405(b) [now §31105(a)(1)(B)], courts have treated the "when" and"because" clauses separately. Under the "when" clause ('when such operation constitutes a violation of any Federal rules...'), 'a driver must show that the operation would have been a genuine violation of a federal safety regulation *at the time he refused to drive* - a mere good faith belief in a violation does not suffice.' (emphasis

added) *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); see also *Brame v. Consolidated Freightways*, 90-STA-20 (Sec'y June 17, 1992); *Robinson v. Duff Truck Lines, Inc.*, 86-STA-3 (Sec'y March 6, 1987) (the Secretary has consistently required a complainant to prove that a truck was actually unsafe when he seeks protection under the 'when' clause). Under the 'because' clause, the complainant need not prove that his refusal to perform an act was grounded in an actual violation, only that his belief in the perceived danger was genuine and reasonable. *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994). The complainant's concern could be couched in terms of either driving unsafe vehicles or engaging in unsafe acts. See *128 Cong. Rec.* 29192 (1982); see also *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987). Section 405(b) [31105(a)(1)(B)(ii)] also requires that the complainant have 'sought from and was unable to obtain correction of the unsafe activity.' See *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1011-12 (5th Cir. 1989)." *Faust v. Chemical Leaman Tank Lines*, 92-SWD-2 (ALJ Dec. 4, 1995).

No Violation Shown Under the "When" Clause

Complainant is unable to avail himself of the "when" clause of § 31105(a)(1)(B)(i) by showing that he was discharged "for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules...." The Complainant fails to meet the language of the clause for two reasons. As reference above, the key timing for proving any alleged violation of a Federal rule is "*at the time he refused to drive*." *See Martin, supra*. Here, the only date that Complainant refused to operate Truck #8 was his last day working for Respondent - April 23, 2001. Complainant admitted that he did not weigh Truck #8 on April 23, 2001. Complainant presented no evidence that Truck #8 was overweight or violated any Federal rule, regulation, standard, or order as of April 23, 2001. Instead, the evidence shows that Complainant intentionally under loaded Truck #8 with 4,200-4,300 gallons of lignin that day. TR pp.77-78. Complainant later argues that Truck #8 could legally haul 4,491 gallons of lignin. ALJX 207, p. 4 (43,120 lbs./ 9.6 lbs. per gallon).

Secondly, Complainant produced no credible evidence that Truck #8 would have been in violation of any Federal rule, regulation, standard, or order had there been 4,800 - 5000 gallons of the lignin mixture loaded on April 23, 2001. Despite both parties arguing contrasting interpretations of the Washington State maximum gross weight limits statute, Truck #8 was capable of hauling 4,800- 5000 gallons of lignin while complying with the applicable maximum gross weight limitation of 77,700 pounds. The evidence presented included the significant tare weight or "empty truck" weight of 33,380 pounds for Truck #8 *with full tanks (600 gallons) of diesel fuel*. I have taken judicial notice that a gallon of diesel weighs about the same as water or 8.34 pounds per gallon. As a result, there is a variance of up to 5,004 pounds for 600 gallons (600 x 8.34) depending on how much diesel fuel remained in Truck #8.

As referenced above, at 9.6 pounds per gallon, 5,000 gallons of lignin weighs 48,000 pounds, and the gross vehicle weight of Truck #8 with that amount of lignin and full fuel tanks

would be 81,380 pounds (48,000 lbs. + 33,380 lbs.) The fact that Complainant weighed Truck #8 to be 5,000 pounds more than that at 9:12 a.m. on April 19 demonstrates he had loaded in excess of 5,000 gallons of lignin mix. It is undisputed that Truck #8 had capacity to haul at least 7,000 gallons of product.

Based on the record presented, Complainant has not shown by a preponderance of the evidence that the 4,800 gallons of the lignin mix he refused to transport caused Truck #8 to be overloaded in violation of Washington State or federal safety standards. 49 U.S.C. § 31105(a)(1)(B)(i) requires that a complainant show an actual violation of a commercial motor vehicle safety regulation. It is not sufficient that the driver had a reasonable or good faith belief about a violation. *Yellow Freight System, Inc. v. Martin*, 983 F.2d *supra.* at 1199.

The only evidence concerning the weight of the tractor/trailer rig with 4,800 gallons of lignin mix is Complainant's testimony that a lignin volume he himself loaded a few days earlier on April 19 had been overweight and Complainant's assertion that the total length of the five-axle tractor/trailer rig was only 42-44 or 46 feet. TR pp. 49, 137-38, 145, CX 18, p. 16. Complainant's testimony that a previous load of lignin mix of April 19, 2001 was overweight when the undisputed testimony was that the tractor/trailer rig driven by Complainant could hold at least 7000 gallons is not sufficient to show that another cargo of lignin loaded later by the same driver was also overweight. See *In the Matter of Gale Cook v. Kidimula Int'l, Inc*, 95-STA-44, slip op.at p. 2, (ARB Mar. 12, 1996)("[C]omplainant's testimony that a shipper once gave him an overweight container is not sufficient to show that another container later offered by the same shipper was also overweight.")

It is this sliding weight scale of diesel fuel that allows Truck #8 to legally carry the minimum 4,800 gallons of lignin in compliance with Yakima County's dust abatement requirements and Washington statute.[16] Thus, no violation relating to the Complainant's act was ever proven. Moreover, Complainant did not contact Hi-Valley, his employer, to attempt to have the allegedly unsafe condition corrected by reducing the fuel in Truck #8 and so cannot avail himself of the protection of the statute in any event. Therefore, Complainant is unable to demonstrate that he engaged in protected activity through application of the "when" clause in § 31105(a)(1)(B)(i).

No Reasonable Belief of Safety Problem or Opportunity for Employer to Correct Alleged Problem Under the "Because" Clause

Having not met the "when" clause for a protected activity, Complainant's alleged protected activity could only come within the ambit of the statute if it is covered by the "because" clause. The "because" clause has not been argued as applicable in support of Complainant's case and is unavailable to Complainant without any evidence that he harbored any genuine and

[16]See footnote 12 and related discussion above.

reasonable belief that his operation of Truck #8 was a perceived danger with a 4,800 gallon load of lignin.

Assuming *arguendo* that the "because" clause is offered in this case, Complainant's claim must be rejected once again because he did not engage in protected activity. Complainant must show that he had "reasonable apprehension of serious danger to himself or the public ...." See 49 C.F.R. § 31105 (a)(2). Thus, in order for activity to be protected under this standard, the employee *subjectively* must fear injury (that is, the fact finder must be convinced that the employee actually was apprehensive that serious injury might result from driving) *and* the employee's fear must be *objectively* reasonable (that is, a "reasonable individual" would have the same apprehension).

Complainant was not concerned about his safety when driving Truck #8 with the trailer that Complainant had used without complaint three or more seasons before 2001. If he was concerned, he could easily have chosen the truck/trailer used by Steve Hurd that was larger and able to carry more weight. More significantly, however, any claimed fears of injury on Complainant's part are not objectively reasonable given Complainant's uneventful prior history hauling lignin with Truck #8. There was no evidence presented at the hearing of any accidents or injuries resulting from drivers hauling overweight loads of lignin or driving defective trucks. The lack of any accidents or injuries is further proof that any alleged apprehension on Complainant's part is not reasonable.

Moreover, the cumulative effect of Complainant's uneventful history selecting Truck #8 and requesting use of its trailer to haul lignin, Complainant's regular morning tardiness, the docking of his pay, the rumors that Complainant had heard from other drivers that he would soon lose his job, the verbal reprimand from Mr. Roark on April 19, 2001, and Complainant's utter lack of credibility, indicate to me that Complainant was not concerned about safety while hauling lignin in Truck #8 and had no legitimate basis for a complaint based on his refusal to operate an unsafe overweight commercial vehicle.

From the first day that Complainant began working for Respondent in the 2001 dust abatement season, Complainant established a routine for being tardy for pre-driving work inspections when compared to the other Hi-Valley drivers. Apparently, the last straw for Complainant was the docking of his pay on April 18, 2001. His attitude deteriorated further with the verbal reprimand from Mr. Roark the morning of April 19, 2001 and after hearing rumors from the other drivers that he would soon lose his job for his repeated tardiness. Finally, it is apparent that Complainant weighed Truck #8 on the morning of April 19, 2001 after he intentionally overloaded more than 5,500 gallons of lignin resulting in the morning weight of 86,200 pounds. CX 6. Complainant has improperly used this intentionally overloaded weight to argue that a protected activity occurred on April 23, 2001 when he voluntarily refused to work any longer for Hi-Valley.

While Complainant's admitted primary alleged safety concern was Truck #8's weight, he did engage in some activities protected under the STAA. These other activities were mentioned by Complainant to Hi-Valley early on when he first selected Truck #8 prior to driving it on April 9, 2001, well in advance of the critical time period of April 19 - 23, 2001 alleged by Complainant. ALJX 201, p.1. The evidence shows that those activities were of such minor significance that they were unlikely to have motivated any desire by Respondent to retaliate against Complainant.

Complainant was not credible in his testimony about the existence of these concerns or their materiality as safety violations. For example, Complainant mentioned a cracked windshield on Truck #8 but it was apparently so insignificant that even the Complainant was unable to remember where the crack was located. He also couldn't remember whether the photograph of Truck #8 showing no cracked windshield, identified in the record as RX. 104, pp.4-5, fairly and accurately depicts Truck #8 as it existed in April 2001. Mr. Roark testified that the windshield of Truck #8 was not cracked and had not been replaced from April 2001 through the date in 2002 that the photograph was taken. Complainant also testified about a perceived problem with Truck #8's air dryer/air can/diaphragm portion of its brakes. He testified that Mr. Roark immediately fixed this problem once mentioned by Complainant. TR, pp. 125, 130-31. Hi-Valley's response to Complainant's safety complaints make it unlikely that Hi-Valley would have retaliated against him. Complainant testified about a missing portion of the steering wheel but later admitted that only padding was missing and that the steering wheel functioned properly. Evidence of Mr. Roark's request that Complainant conduct a timely pre-trip inspection of Truck #8 each morning like the other Hi-Valley drivers is inconsistent with Complainant's allegation that Mr. Roark was not a safety-minded employer. Mr. Roark also credibly testified that Complainant did not raise concerns at any time about missing lug nuts, a cracked windshield, or a problem with Truck #8's u-joint on the steering wheel. TR p.217. Finally, Complainant testified that he believed that Hi-Valley should have some type of pre-employment drug testing program for its drivers. Mr. Roark convincingly testified that he did not need such a program since Yakima County already provided this same program for drivers under the dust abatement program.

Complainant's years of past practice driving Truck #8 with use of the subject trailer and his voluntary selection of Truck #8 over the larger truck driven by Steve Hurd further demonstrates his lack of concern about safety. Complainant is simply not believable should he argue that he had a reasonable apprehension of injury due to the alleged unsafe condition of Truck #8. The events leading up to Complainant's refusal to drive on April 23, 2001 were precipitated by both Complainant's pattern of showing up for work later than the other drivers and his belief that he would soon lose his job. These events did not come about by any safety concerns of Complainant. Complainant cannot invoke the protection of the "whistleblower" statute to relieve himself of the consequences of his own tardy behavior.

Accordingly, the only evidence directly supporting the existence of mechanical defects in Truck #8 is Complainant's inconsistent testimony. I am unable to credit the Complainant's testimony about the complaints in early April 2001 because of the contradictory testimony and photographs of Truck #8 provided by Mr. Roark either denying the existence of any alleged

defect or claiming a timely correction of the problem. Moreover, Complainant did not produce any corroborating evidence, such as the driver vehicle inspection reports, which the U.S. Department of Transportation requires every motor carrier driver to file daily and in which the driver must "list any defect or deficiency discovered by or reported to the driver which would affect safety of operation of the motor vehicle or result in its mechanical breakdown." 49 C.F.R. § 396.11(b) (2000).

As to the alleged defect problems with Truck #8, Mr. Roark's demeanor and overall testimony was more consistent and believable than Complainant's. Consequently, I find that there is insufficient evidence to show that the Complainant engaged in STAA-protected activities by making unresolved internal safety complaints about Truck #8 in early April 2001. In addition, because I am unable to credit the Complainant's testimony about his complaints in early April 2001 concerning Truck #8, I find that these alleged unresolved complaints do not qualify as protected activity under section 31105 (a)(1)(B)(ii).

Further, since Complainant failed to enlist the assistance of his employer, Hi-Valley, in sorting out any perceived safety concerns he might genuinely have had, he cannot avail himself of the protection of the statute even if he did engage in protected activity. See 49 U.S.C. § 31105(a)(2)("... [E]mployee must have sought from the employer, and been unable to obtain correction of the unsafe conditions.); see also *Perez v. Guthmiller Co., Inc*., 87-STA-13, (Sec'y Dec. December 7, 1988), slip op. At p. 4)(Same.) Thus, Complainant failed to establish the liability prerequisite that Mr. Roark was aware of the alleged protected activity involving the alleged overweight vehicle on April 23, 2001. Certainly, an adjustment of diesel fuel alone could have corrected any actual weight problem given the 5,004 pound variance associated with the 600 gallon diesel tanks of Truck #8. As to the minor problems with Truck #8 alleged early on by Complainant, the evidence shows that Mr. Roark either corrected the problem or his testimony is believed that the problem never existed when compared to Complainant's vacillating or unsupported testimony in this area.

I also find that the Complainant has failed to establish by a preponderance of the evidence that he engaged in the protected activity of refusing to drive because of the unsafe condition of Truck #8. Complainant's testimony alone, controverted and contradicted even by his own statements, is insufficient to meet his ultimate burden of persuasion that he refused to drive Truck #8 because he had a reasonable apprehension of injury due to the unsafe condition of that truck and that he sought, and was unable to obtain correction of such condition. Since Complainant has not established that he engaged in protected activity under either the "when" or "because" clauses of §31105(a)(1)(B), and moreover, did not contact his employer regarding the allegedly unsafe condition on April 23, 2001 in an attempt to have the condition corrected before refusing to drive Truck #8 with the minimum 4,800 gallons of loaded lignin, he has not made out a *prima facie* case that he engaged in protected activity.

Whether Respondent Took an Adverse Action Against Complainant

Even were I to accept Complainant's unsubstantiated assertion that he refused to drive because of the unsafe condition of Truck #8, Complainant cannot prevail without establishing that Respondent took adverse action against him, in this case, the alleged discharge from employment, because of this refusal. Respondent argues that it did not discharge Complainant but that he voluntarily quit. ALJX 202, p. 4.

The evidence on this issue is conflicting. On the one hand, Complainant contends that on April 23, 2001, he was fired when he voiced his belief that Truck #8 was overloaded purportedly in violation of the maximum gross weight limit law while loaded with only 4,200 gallons of lignin. Complainant was then sent away when the County then refused to allow Complainant to keep hauling given the applicable minimum hauling requirement of 4,800 gallons of lignin. Complainant drove Truck #8 to Respondent's equipment yard and either initially, or during a second telephone conversation from Mr. Roark, was asked to drive to the lower valley to work things out.

Respondent, on the other hand, says that Complainant refused to continue driving in the lower valley each time they spoke on April 23 after Complainant had been sent home for failing to haul the minimum lignin load. Finally, after a second cellphone call from Mr. Roark, Complainant said that he was not going to drive Truck #8 to where Mr. Roark was in the lower valley and was, instead, on his way to pay a utility bill in his own pick-up truck. Once Complainant refused to meet to attempt to resolve the problem with Mr. Roark, Mr. Roark stated that his only option was to hire another driver. The evidence shows that Complainant was never told that he did not have a job or that he was being laid off. Mr. Roark asserts that Complainant, in effect, quit by refusing to haul more than 4,000 gallons of lignin and, instead, returned Truck #8 to the equipment yard on April 23, 2001. Mr. Roark's demeanor was credible when he testified that he begged Complainant to bring Truck #8 to the lower valley to keep hauling. Mr. Roark also testified that he made profit from the Yakima County contract even after paying his drivers so there was incentive for Mr. Roark to keep Complainant as an employee.

In view of the lack of evidence to corroborate either man's testimony on this issue and my belief that Mr. Roark was more credible than Complainant, Complainant has not proven the occurrence of an adverse action by a preponderance of the evidence. There is insufficient evidence for any conclusion that Complainant reasonably believed that he had been fired especially since Mr. Roark believably testified that he begged Complainant to return to work on April 23. At no time was Complainant instructed to remove his belongings from Truck #8 or was he ever prevented from completing his assigned job by Respondent. Even assuming that each party was telling the truth, there would remain an insufficient basis for finding the Complainant has shown the occurrence of an adverse action by a preponderance of the evidence. See *Cook v. Kidimula Int'l, Inc*., 95-STA-44, *supra* at slip op. p. 3 (Insufficient basis for finding proof of adverse action when neither party puts forth a preponderance of evidence.).

Also, it has been held under the STAA that

> [A] constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign"...Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions.

Hollis v. Double DD Truck Lines, Inc., Case No. 84-STA-13 (Sec'y March 18, 1995), slip op. at 8-9.

The burden of proving a constructive discharge rests with Complainant. I have already found that Complainant has failed to establish that Respondent required him to drive a mechanically defective vehicle or a vehicle illegally overweight, and has failed to establish that he communicated his safety concerns to Mr. Roark. I, therefore, do not find that Complainant was compelled to drive away from the worksite because of either the condition of Truck #8 or because it could not haul a legal weight limit when loaded with more than 4,200 gallons of lignin. Moreover, it being clear from the record that Complainant has failed to establish the existence of working conditions which would compel Complainant to remove himself from the worksite, I conclude that Respondent did not discharge Complainant on April 23, 2001.

No Evidence of Retaliation

In this case, even were I to find that Respondent took adverse action against Complainant by telling him that he would have to hire someone else after Complainant refused to haul more than 4,000 gallons of lignin, this record taken as a whole would not show that Respondent's adverse action was in retaliation for protected conduct. Rather the record shows that Complainant refused to follow the instructions he had followed in prior years and the days leading up to April 23, 2001, by hauling at least 4,800 gallons of lignin per load in Truck #8 and, accordingly, Respondent legitimately replaced him for that work assignment. Such replacement for a specific assignment would not be a protected work refusal under the STAA, and Complainant presented no evidence to dispute Respondent's version of the incident. See *Galvin v. Munson Transportation, Inc.*, 91-STA-41, (Sec'y Decision August 31, 1992)(Same).

Accordingly, because Complainant has failed to present sufficient evidence to carry his ultimate burden of establishing that Respondent took adverse action against him in retaliation for refusing to drive an overweight truck, this complaint must be dismissed.

RECOMMENDED ORDER

IT IS RECOMMENDED that the STAA complaint filed by Russell Olson be *dismissed*.

A

Gerald Michael Etchingham
Administrative Law Judge

Notice of Right to Appeal

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996)